Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The
Supreme Court of The United States
October Term 1996

DAVID M. MUMFORD,
Petitioner,

v.

DAVID A. BASINSKI,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX FILED UNDER SEPARATE VOLUME

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QUESTIONS PRESENTED FOR REVIEW

#1 Whether, consistent with this Court's holdings in *Branti v. Finkel*, 455 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574, *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990) and *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S.Ct. 2353 (1996), and in direct conflict with decisions from this Court and from other Circuits, the Sixth Circuit erred in holding that a government position was inherently political as a matter of law, when the Defendants admit and all the facts demonstrate that political affiliation was not an appropriate requirement for the position?

#2 Whether, under *McMillian v. Monroe County, Alabama*, 65 L.W. 4403 (1997), a county is liable for the administrative acts of an administrative judge for a county common pleas court acting in the particular area or issue regarding employment decisions for a local government?

PARTIES TO THE PROCEEDING

Petitioner is David M. Mumford, an individual who was terminated from his position as a domestic relations court referee in Lorain County, Ohio.

Defendant originally was Joseph C. Zieba, in his individual and official capacities, but David A. Basinski was substituted, in his official capacity, when he replaced Joseph Zieba as the Administrative Judge of the Lorain County Domestic Relations Court.

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PETITION FOR WRIT OF CERTIORARI

David M. Mumford respectfully asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case reported at 105 F.3d 264 (6th Cir. 1997).

OPINIONS BELOW

The opinions of the Court of Appeals for the Sixth Circuit are reported at 105 F.3d 264 (6th Cir. 1997) and 4 F.3d 429 (6th Cir. 1993), and are reproduced at Apdx. A, pp. 1-29 and Apdx. F, pp. 1-29. It is the most recent 1997 decision which Petitioner David Mumford now seeks this Court to review.

The opinions of the U.S. District Court for the Northern District of Ohio, Eastern division, are reported at *Mumford v. Zieba*, 788 F. Supp. 987 (N.D., Ohio 1992) and *Mumford v. Basinski*, 915 F. Supp.917 (1995) and are reproduced at Apdx. D, pp. 1-14 and Apdx. E, pp. 1-7.

STATEMENT OF JURISDICTION

Petitioner David M. Mumford is requesting a Writ of Certiorari under 28 USC Section 1254(1) to review the final judgement and order of the United States Court of Appeals for the Sixth Circuit, found at 105 F.3d 264 (6th Cir. 1997)

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution, raised via 42 U.S.C. Section 1983.

STATEMENT OF THE CASE

This is a case about the asserted power of an elected government official to terminate the employment of a subordinate because of his political affiliation and beliefs when the elected official had admitted and all the relevant facts demonstrate that political affiliation was not an appropriate requirement for the effective performance of the position involved.

Petitioner David Mumford was employed as a referee in the Lorain County Domestic Relations Court from 1979 to January 2, 1989. Mumford's duties as a matter of fact and as delineated in Rules 53 and 75 of the Ohio Rules of Civil Procedure and Rule 40 of the Ohio Rules of Juvenile Procedure were limited to hearing evidence and making recommendations of findings of fact and conclusions of law to the Court for its final decision.

In 1988, Republican Joseph Zieba ran against incumbent Judge Henry Webber, a Democrat. Mumford supported Webber in his campaign, during the course of which Zieba told Mumford, "don't get caught in the cross-fire." Zieba observed Mumford, a Democrat, distributing campaign literature on behalf of incumbent Democrat Webber. Apdx. D-3.

In the November 1988 election, Republican Zieba defeated incumbent Democrat Webber for the Domestic Relations Court judgeship. A second Domestic Relations Court judge, David Basinski, a Democrat to whom referees such as Mumford

would report to as well as Zieba, was elected at the same time.

On December 22, 1988, administrative judge-elect Zieba[1] notified Mumford that his employment would terminate on January 3, 1989, the day Zieba took office. Zieba had never observed Mumford's work performance. Apdx. D-5. Zieba then appointed two Republicans to replace Mumford as referees reporting to the two Domestic Relations Court Judges. Apdx. D-4.

On December 17, 1990, Mumford filed this action in the U.S. District Court, Northern District of Ohio, pursuant to section 1983, alleging termination from his referee position because of his political activities campaigning for his employer, Judge Webber, and suing Judge Zieba in his individual and official capacities.

On March 31, 1992, the district court denied qualified immunity to Zieba, relying on *Branti v. Finkel*, 455 U.S. 507 (1980), finding that the inquiry whether the position was one for which political affiliation was an appropriate requirement was a question of fact, relying on *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 288-289 (7th Cir., 1985) and *Faughender v. City of North Olmsted*, 927 F.2d 909, 913-14 (6th

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[1] The administrative judge position, which had ultimate and final power over county employees working for the court, alternated between Judge Zieba, a Republican, and Judge Basinski, a Democrat, on a yearly basis. All referees of the court simultaneously reported to both judges pursuant to the above cited Ohio Rules of Civil and Juvenile Procedure.

Cir.1991). The district court also found the position was not political. Apdx.D, pp. 1-14.

On September 1, 1993, the Court of Appeals reversed the trial court on its denial of qualified immunity and sent this case back to the district court for trial. Apdx. F, pp. 1-18.

On September 28, 1995 after this case had been re-assigned, the district court found that because Zieba had retired and because the new administrative judge, Basinski, a Democrat, had been substituted as the official capacity defendant, the case was moot. Apdx E, pp. 1-7. The district court also found the official capacity entity defendant that remained was Lorain County. Apdx. E-5. This dismissal came after three trial continuances, five years of litigation and twelve days before trial.

On January 23, 1997, the 6th Circuit Court of Appeals filed the instant opinion. Apdx. A, pp. 1-29. On appeal, Mumford successfully convinced the 6th Circuit that the moot-ness ruling was not correct. The Court ruled in the same opinion that the 11th Amendment barred Mumford's complaint, and that as a matter of law the position of court referee was an unpro-tected political position. This ruling was made in spite of Petitioner's objections that the scope of the appeal should have been limited to the solitary finding of mootness. Apdx. H, pp. 1-5 and in spite of the fact that the district Court at 788 F. Supp. 987 (N.D., Ohio 1992) had determined the position was to be protected, an issue not upset by the first Sixth Circuit opinion at 4 F.3d 429 (6th Cir 1993). Defendants never filed a cross-appeal. Apdx. A, pp. 1-29.

On February 6, 1997 Petitioner filed for a Rehearing En Banc. Apdx. B, pp. 1-22, which was denied on March 7, 1997. Apdx. C, p.1-2.

On May 13, 1997, Justice Stevens, extended the time within which to file this Petition for Certiorari to and including August 4, 1997.

Between 1990 and 1997, Petitioner has obtained two district court rulings and two opinions from the Court of Appeals for the Sixth Circuit, and has not yet had his day in court. This alone should underscore the need for clarity in this area. Had Mumford had clarity or had Lorain County had clarity, both could have saved years of time and expense.

The U.S. Court of Appeals for the 6th Circuit, in direct conflict with previous decisions of this Court and decisions from other Circuits, upheld petitioner's termination on the ground that his employment position was inherently political as a matter of law.

This case presents direct conflicts between the Sixth Circuit and this Court and conflicts between the U.S. Courts of Appeals and the Sixth Circuit.

The Sixth Circuit Court of Appeals by their 1993 and 1997 rulings in this case have taken away the right of every employee working for any judge in Ohio to sue them individually or in their official capacity for their unconstitutional administrative personnel actions. The decisions in this case render the constitutional protection of *Branti v. Finkel*, 455 U.S. 507, 519-520 (1980) and its progeny regarding administrative employment matters meaningless.

The instant 1997 decision holds that all actions by judges over county court employees are viewed in Ohio as actions of "state judges", thus allowing 11th amendment protection regardless of the particular area or issue involved.

Mumford seeks certiorari of that portion of the instant

decision that goes beyond mootness, the only issue appealed. The Court of Appeals incorrectly decided two issues not before it and without the benefit of briefing: 1) *sua sponte* denying Mumford due process by summarily deciding that his position was not entitled to First Amendment protection, ignoring the record and the 1992 District Court Opinion based on the record; and 2) the Court reversing its own 1993 decision that the case should go to trial by reversing specific findings from the 1995 district court decision by incorrectly finding that Lorain "county" referees are state employees, working for a state judge, without even distinguishing the roles of judge as judicial officer and administrative department head for Lorain County.

Defendants never assert anywhere in the record that the position was one for which political or party affiliation was an appropriate requirement. In fact, they deny this is the case. See answer at Apdx. M, p. 4, par. 14: "the political affiliation of Attorney Balunek and Attorney Musson was not relevant to and/or a prerequisite for their respective employment with the Lorain County, Ohio Court of Common Pleas, Domestic Relations Division." These two referees replaced Mumford.

Zieba testified that he knew of no political duties his referees had; that they were free to follow their own conscience as to politics, adding that politics was absolutely not a consideration for the efficient smooth running of the referee position, whether it be Republican, Democrat, Socialist or anything else. Apdx. Y-6.

The other administrative judge, David Basinski, a Democrat, also confirmed in testimony that party affiliation was not a necessary requirement for the effective performance of a Domestic Relations Court Referee. Apdx. S-3. This job entailed

recommending proposed findings of fact and conclusions of law to the judges of both parties. Apdx. J, pp. 1-17. No political duties or party affiliation requirements are described in the Ohio rules of procedure.

The court in the instant case decided that a public positions' general or specific duties are to be determined as a matter of law. The district court at 788 F. Supp. 987, 991 (N.D., Ohio, 1992) had earlier determined that is a question of fact, not of law, relying on *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 288-289 (7th Cir., 1985). The Sixth Circuit's 1993 decision had agreed with the district court's 1992 decision by finding that the analysis of the merits of Petitioner's claims was to be one based on the "inherent duties of the position and the duties of the new incumbent to determine whether political affiliation is an appropriate consideration for appointment to a particular vacancy." Apdx. F, pp. 8-9. The 1993 and 1997 6th Circuit decisions themselves conflict, revealing the level of confusion extant due to a lack of clarification as to which test is to be applied, factual or legal.

Mumford should prevail under either analysis.

Under a purely factual analysis, defendants' answer and defendants' testimony that the position is not political lead to one conclusion, Mumford prevails. The 1992 district court opinion comes to this conclusion as well.

Under a purely legal analysis, the position of domestic relations court referee is not a political position. Ohio Rules of Civil Procedure 53 and 75 and Ohio Rule of Juvenile Procedure 40 limit the duties of a referee to hearing evidence and making recommendations--duties that under the law or based on a factual analysis come to the same conclusion--Mumford's position before

and after his termination was, under *Branti*, one which did not require party affiliation for its effective performance.

Without any record-based findings, the instant court found that the Lorain County judge was a state judge, and the "county" court was a "state" court at 105 F.3d 264 (6th Cir. 1997), failing to look at the administrative function at work here: a county office holder firing a county employee.

State law does not indicate that the Administrative Judge, acting as employer over County employees, is a state official.

The instant court denied a rehearing *en banc*, though the 11th Amendment issue and the question of law versus question of fact issue as to the non-political nature of Petitioner's position had not been argued or briefed on the record.

The instant decision appealed here conflicts with the decision of this Court in *McMillian v. Monroe County, Alabama*, 65 LW 4403 (1997) [Apdx. BB 1-35], insofar as it fails to analyze who an official represents in a particular area or on a particular issue. Had the Sixth Circuit performed this analysis, the judges' roles as administrators over employment matters would have been scrutinized, and their role as employers over local county employees would have caused the Sixth Circuit to come to the conclusion that Judges Zieba and/or Basinski are, in their capacities as administrators over county employees, representatives of the county, not the state.

REASONS FOR GRANTING THE WRIT

This case presents for review a question of paramount importance to all government employers, and employees who are entitled to exercise their precious First Amendment freedoms of uncoerced political belief and association and, most importantly,

the general public which relies on both the continued vibrancy of the First Amendment freedom which undergirds our democratic form of government and the efficient provision of government services.

In *Elrod v. Burns*, 427 U.S. 347, 359, 96 S.Ct. 2673, 2683 (1976), this Court held that conditioning government employment on the employee's support for the favored political party "unquestionably inhibits protected belief and association" in violation of the First Amendment to the United States Constitution. In *Branti v. Finkel*, 455 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574, this Court clarified the existence of a narrow exception to this general principle whereby political patronage remains constitutionally permissible only if "party affiliation is an appropriate requirement" for the employment position.

It is beyond dispute that this standard has resulted in conflicting tests applied by the different Courts of Appeal, "inconsistent and unpredictable results" in litigation, and general confusion for government employers and employees alike. *See, e.g., Rutan v. Republican Party*, 110 S.Ct. 2729, 2756-57 (1990) (Scalia, J., dissenting).

The instant case, in which the issue is whether political party affiliation is an appropriate employment requirement for a hearing officer or referee, is an excellent vehicle for this Court to provide much needed clarity. The instant case directly conflicts with *Roldan-Plumey v. Cerezo-Suarez*, 115 F.3d 58 (1st Cir. 1997), and *Meeks v. Grimes*, 779 F.2d 417 (7th Cir. 1985). This conflict between the Circuits goes beyond a mere conflict as to result and embodies a deeper and pervasive conflict as to

the proper method of analysis: i.e., whether the "appropriate requirement" criteria is an issue of fact or an issue of law.

This case also presents a second important issue for review by this Court. In this case the court below failed to perform the factual analysis required by this Court in *McMillian v. Monroe County, Alabama*, 65 L.W. 4403 (1997) in order to determine whether the administrative judge who terminated Petitioner's employment was acting as the final policymaking decision maker for Lorain County or the State of Ohio. The court below, by basing its decision on the status of Respondent as a judge rather than his status as a County Administrator with supervisory authority over county employees, such as petitioner, thereby created a conflict with numerous decisions of other United States Courts of Appeals which have addressed this issue and, as a result, inappropriately expanded the scope of Eleventh Amendment immunity.

For the reasons set forth more fully below, David Mumford respectfully requests that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case in order to provide much needed stability and clarity on these two issues of paramount public importance which have engendered irreconcilable conflicts between all federal courts of appeal.

#1 Whether, consistent with this Court's holdings in *Branti v. Finkel*, 455 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574, *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990) and *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S.Ct. 2353 (1996), and in direct conflict with decisions from this Court and from other Circuits, the Sixth Circuit

erred in holding that a government position was inherently political as a matter of law, when the Defendants admit and all the facts demonstrate that political affiliation was not an appropriate requirement for the position?

This Court decided *Elrod v. Burns*, 427 U.S. 347 (1976) as a benchmark case twenty one years ago. Then, seventeen years ago, this Court decided *Branti v. Finkel*, 455 U.S. 507, 519-520 (1980) holding that the "First Amendment forbids government officials to discharge...public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement." *Rutan v. Republican Party*, 110 S.Ct. 2729, 2732 (1990), *citing Branti v. Finkel, supra.*

In *Branti v. Finkel*, 455 U.S. at 524, 100 S.Ct. at 1297-98, Justice Powell predicted that problems in application of this Court's holding would result because: "The standard articulated by the court [in *Branti*] is framed in vague and sweeping language. Elected and appointed officials at all levels...no longer will know when political affiliation is an appropriate consideration in filling a position." 445 U.S. at 524, 100 S.Ct. at 1297-98.

Eleven years later Justice Scalia pointed out that Justice Powell's prediction was prophetic, that "[t]he Courts of Appeal have devised various tests for determining when 'affiliation is an appropriate requirement' and that '[t]hese interpretations are...significantly at variance with each other.'" *Rutan v. Republican Party*, 110 S.Ct. at 2756. (dissenting opinion)

Of course, not only judges and elected and appointed officials are confused, but also thousands of public employees are unsure of whether they have protection under the Constitution of the United States. Parties on both sides of the issues of who is

protected and who is not [and when], and what clearly established law exists [and when], need clarification after almost two decades after *Branti*.

With so many conflicts in so many areas, it is apparent that both defendant public officials and plaintiff public employees are entitled to have the method of applying the *Branti* test clarified.

The test initially was created by this Court in *Elrod* in 1976 and changed in *Branti in 1980*. For the last seventeen years, there has been no benchmark case clarifying the problems that have developed as a result of the circuit courts' interpretations of both *Elrod* and *Branti*. The conflicts in application of the *Branti* test that exist between the circuits makes this case a perfect vehicle for this Court to give much needed instruction and clarification needed by public office holders and employees.

Circuits conflict as to whether the analysis should be based on law, based on fact, based on job description, based on job responsibilities, based on job category, based on inherent duties, based on statutory duties, based on relative pay, technical competence, power to control others, authority to speak in the name of policy makers, public perception, influence on programs, contact with elected officials, responsiveness to partisan politics and political leaders and whether the responsibilities of the position are not well defined or are of broad scope. [See "A Decade of *Branti* decisions: A Government Official's Guide to Patronage Dismissals", The American University Law Review, Vol. 39:11, Susan Lorde Martin, p. 26] The waste of resources, the expansion of litigation and the burdens to the judicial system at every level beg for guidance and clarification of the *Branti* test from this Court.

There is a significant, longstanding split between the Circuit Courts of Appeals as to whether the analysis of a public employee's position as falling under the protections of *Branti* is to be viewed as a question of law or a question of fact.

Circuit courts finding that this is a question of law are as follows: *Ness v. Marshall*, 660 F.2d 517, 522 (3rd Cir., 1981) [where, as a matter of law, a person is determined to have occupied a policymaking position, that person's claims to protection under *Elrod* and *Branti* are disposable on summary judgment]; *Mumford v. Basinski*, 105 F.3d 264, 271 (6th Cir. 1997) [although unique duties are typically fact driven, characterization of general *or* specific duties are a question of law]; and *Bauer v. Bosley*, 802 F.2d 1058, 1062 (8th Cir., 1986) [on the facts before us the SLA II position is excepted from the rule of *Elrod-Branti* as a matter of law.] The *Bauer* Court's next comment, at 1062, is indicative of the need for an *Elrod-Branti-Mumford* trilogy from this Court, that "courts themselves have disagreed whether the determination is one of law or fact. *See Horton v. Taylor*, 767 F.2d 471, 478 (8th Cir. 1985) and cases cited therein."

Circuit courts, and the apparent majority of the circuits, finding that this is a question of fact are as follows: *Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255, 1258 (1st Cir. 1987) [fact-specific nature of the analyses performed by these other courts makes it difficult in any given case to decide the merits solely on the basis of precedent]; *Rodriguez-Burgos v. Electric Energy Authority*, 853 F.2d 31, 37 (1st Cir., 1988) [there remains, in our view an important factual dispute about whether or not the job requires PDP affiliation for effective performance]; *Zold v. Township of Mantua*, 935 F.2d 633, 635 (3rd. Cir., 1991)

[each decision is, of course, fact specific for that case]; *Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir., 1990) [case by case, position by position, activity by activity analysis required for just adjudication]; *Nekolny v. Painter*, 653 F.2d 1164, 1169 (7th Cir., 1981) [the determination of status as a policymaker in many cases presents a difficult factual question]; *Soderbeck v. Burnett County, Wis.*, 752 F.2d 285, 288-289 [rejecting defendants argument that whether loyalty is essential is always a question of law] (7th Cir., 1985)]; *Meeks v. Grimes*, 779 F.2d 417, 420 [noting that it was not possible to state categorically that bailiffs are confidential employees as a matter of law] (7th Cir., 1985); *Lohorn v. Michal*, 913 F.2d 327, 335 (7th Cir., 1990) [district court erred in concluding that, *as a matter of law*, the statutory label alone rendered Mr. Lohorn a "policymaker" within the meaning of the *Elrod-Branti* exception to politically motivated dismissals]; *Matlock v. Barnes*, 932 F.2d 658, 663 (7th Cir., 1991) [by its nature, the question of whether a job is policymaking or confidential is often factual]; *Zorzi v. County of Putnam*, 30 F.3d 885, 893 (7th Cir., 1994) [whether *Meeks* exempts Hansen from the requirements of *Elrod-Branti* therefore requires a factual inquiry into whether Hansen and Zorzi's working relationship was intimate and involved direct and constant contact]; *Horton v. Taylor*, 767 F.2d 471, 479 (8th Cir. 1985) [the legal standards to be applied by the district court depend on these preliminary factual findings] and *Terry v. Cook*, 866 F.2d 373, 377-378 (11th Cir., 1989) [loyalty to an individual sheriff as an appropriate requirement for effective job performance has not been established [and] is a determination [that] depends on the actual responsibilities of each position and the relationship of each to the sheriff].

The Court in *Horton v. Taylor*, 767 F.2d 471, 478 (8th Cir. 1985) saw five years after *Branti* the confusion Justice Powell predicted that "...courts [would] disagree whether such determinations are matters of fact or of law--and are also aware of the implications of this issue for the degree of deference we must pay the district court's determinations. *See* Fed.R.Civ.P. 52(a)."

The positions afforded protection and those denied protection create the same deepening rift between the circuits as to the types of positions protected. A sheriff in one circuit may be protected, and not in another. A referee/hearing examiner is protected in one circuit, and not in another.

Examples of this disparity in job title/job function as to who is protected and who is not, between the circuits, follows:

Job Title	**Protected**	**Not Protected**
Attorney	2nd Cir.[2]	3rd Cir.[3]

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[2] *Tavano v. County of Niagra*, 800 F.2d 1128 (2nd Cir., 1986) affirming district court at 621 F. Supp. 345 (W.D.N.Y., 1985).

[3] *Ness v. Marshall*, 660 F.2d 517, 522 (3rd Cir., 1981).

Job Title	Protected	Not Protected
Deputy Sheriffs	4th Cir.[4]	7th Cir.[5]
	3rd Cir.[6]	5th Cir.[7]
	10th Cir.[8]	11th Cir.[9]
	5th Cir.[10]	7th Cir.[11]
Bailiffs	7th Cir.[12]	6th Cir.[13]
Referee/Hearing Examiner	1st Cir.[14]	6th Cir.[15]

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[4] *Jones v. Dodson*, 727 F.2d 1329 (4th Cir., 1984)

[5] *Upton v. Thompson*, 930 F.2d 1209 (7th Cir., 1991)

[6] *Burns v. County of Cambria, Pa.*, 971 F.2d 1015 (3rd Cir. 1992)

[7] *McBee v. Jim Hogg County, Texas*, 730 F.2d 1009 (5th Cir., 1984)

[8] *Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir., 1988), involving deputy head jailer to sheriff.

[9] *Terry v. Cook*, 866 F.2d 373 (11th Cir., 1989)

[10] *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir., 1981)

[11] *Dimming v. Wahl*, 983 F.2d 86 (7th Cir., 1993)

[12] *Meeks v. Grimes*, 779 F.2d 417 (7th Cir., 1985)

[13] *Balogh v. Charron*, 855 F.2d 356 (6th Cir., 1988)

[14] *Roldan-Plumey v. Cerezo-Suarez*, 1997 U.S. Lexis 13050.

[15] *Mumford v. Basinski*, 105 F.3d 264 (6th Cir., 1997)

Petitioner submits that proper application of the *Branti* analysis should produce such inconsistent results because the analysis must be based on facts, not mere job titles. The consistency that is needed is that all circuits should scrutinize cases based on a factual analysis of the inherent duties of the position, not based on a mere legal and superficial analysis of job titles.

Instead, the determination as to the propriety of a political affiliation requirement for a particular position should be based on what the persons in the actual job does for the particular employer. Since not every government office operates in the same way, it is only to be expected that persons with the same job titles in different communities have different responsibilities. Therefore, a person occupying a position of court referee in one jurisdiction may have duties that would lead to legitimate considerations of political affiliation, while a person with that title in another jurisdiction may have duties of a purely non-political nature so that political affiliation should, pursuant to the First Amendment, play no part in the decisions made regarding his employment. The Court in *Meeks v. Grimes*, 779 F.2d 417, 420-21, n.2 (7th Cir. 1985), accordingly, found that "job responsibilities and duties can vary greatly between different governmental units and or even within a governmental unit...[therefore]...the test under *Branti* must be applied to each individual office, and status under that formulation is left to the trier of fact to be determined."[16]

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[16] Another conflict exists between the instant case and *Meeks*. *Meeks* involved referees reporting to one judge. The Court found the referees were protected because they did not have everyday contact with judges in their chambers. *Meeks*, at 417, 423. In the instant case,

The instant case could be viewed, ironically, as lending some predictability to the process, since it is based on a hypotethical job description of how a referee operates. Under its analysis, any person with that job title would not be protected, regardless of what their job duties are.

This analysis runs counter to the manner in which most circuits follow this Court's teachings in *Elrod*, *Branti*, and *Rutan*. The Sixth Circuit's analysis leads to inconsistency and unpredictability among the Circuits.

Moreover, the Sixth Circuit decision allows a government employer too much leeway determining which employees are protected by the First Amendment. Simply by labelling the employees' job titles, the employer can take away constitutionally protected rights. The mode of analysis utilized by the Sixth Circuit should not be utilized.

Instead, the principles pronounced in this Court's prior decisions should be reaffirmed and further clarified so that government employees will be able to predict whether their careers are subject to political patronage by reference to what they know to be their legitimate job duties, and so government employers will know the boundaries of their employment powers.

Justice Scalia observed in *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2756-2757 (1990) after citing a number of job categories, like the above, where protection is inconsistently applied and withheld by the different circuits, that "this summary should make it obvious that the 'tests' devised

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the referees reported to two judges, of different parties, Apdx. D, p. 11., and, in spite of this fact, were viewed as not protected by the instant 6th Circuit decision.

to implement *Branti* have produced inconsistent and unpredictable results." Petitioner is in agreement with what Justice Scalia points out next, at 2757, that

> "...the current doctrine leaves many employees utterly in the dark about whether their jobs are protected, they are likely to play it safe. On the other side, the exception was designed to permit the government to implement its electoral mandate...unless the government is fairly sure that dismissal is permitted, it will leave the politically uncongenial official in place, since an incorrect decision will expose it to lengthy litigation and a large damage award, perhaps even against the responsible officials personally.

When looking at the referee position in question, which involves simultaneously recommending findings of fact and conclusions of law to two judges of different parties sitting in the most "impartial" of government positions, the observation Justice Scalia's made in *Rutan* is central: "if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable." *Id.* at 2746. If this is true for judges, it is true for their impartial referees.

This Court in *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S.Ct. 2353, 2358 (1996) found that the *Branti* standard required a case-by-case fact based application. A fact-driven analysis is the only fair analysis when applying *Branti* because whether party affiliation is an appropriate requirement for the position necessarily must turn on the facts of each situation. Again, as in this case, the position involved reporting

simultaneously to two judges of different parties. How can this undisputed fact be ignored in favor of non-record based assumptions inferred by the Circuit Court in this case reading between the lines of various civil rules? At Apdx. A, p. 22, the 6th Circuit, based on a review of Ohio Civil Rule 53, infers, with no reference to any evidence in the record, that "unquestionably, the inherent duties of an Ohio domestic relations court referee entail a relationship of confidence between the referee and the judge(s) he serves. The referee is privy to confidential litigation materials and internal court communica-tions in the discharge of his duties, and further maintains a confidential relationship with the judge(s) which he serves." This "unquestionable" conclusion, however, flies in the face of the undisputed facts and testimony in this case, and is wholly drawn from inference not based on evidence in the record. No evidence exists in the record that Petitioner was privy to "confidential litigation materials" or "internal court communications." None are identified. None exist. Further, no "confidential" relationship exists--no one in this case disputes that the referee position in question reports simultaneously to two judges of different parties. No confidential relationships exist. None have been identified.

The instant case employed an analysis that took the issue that Mumford's referee position was not a political position from the trier of fact, the district court, that had already decided the issue in 1992, and made a sweeping, non-record-based decision that did not utilize the application of *Branti* to the individual office, but rather, as indicated above, made the assumption that "friction and animosity" were probable expectations that would creep into the situation. Apdx. A, p. 19. This was not in the record. There were two judges to report to from different political

parties: Administrative Judge Zieba, a Republican; and alternating Administrative Judge Basinski, a Democrat. See Apdx. V, p.1, testimony of referee Frank Giamboi.

The instant case conflicts with *Meeks v. Grimes*, 779 F.2d 417, 420-421, n.2 (7th Cir., 1985), in that the *Meeks* court ruled that "...it is impossible to generalize about the nature of an individual type of position, such as bailiff or secretary; job responsibilities and duties can vary greatly between different governmental units or even within a governmental unit...For this reason the test under *Branti* must be applied to each individual office, and status under that formulation is left to the trier of fact to be determined." The instant case makes no such application to the referee position in question.

Meeks, at 420-421, and n.2 also rules that it cannot conclude that "bailiffs" are confidential employees as a matter of law because bailiffs are duty-bound to protect the sanctity of the court, and, "...while political affiliation may be an acceptable proxy for loyalty, trust, and maybe even efficiency, it would cast the net of the *Elrod* exception too wide to allow political support to be used to extrapolate a tendency to breach a sworn duty, behave unprofessionally, or commit criminal acts."

In addition, in *Meeks* at 423, n.7, the 7th Circuit wrote that "[w]hat may distinguish judges for patronage purposes is the unique relationship they have with the people who work with them in their chambers. However, differing structures of judicial systems and governments mean that each case is unique and an intimate working environment may or may not exist surrounding any political hiring authority."

The problem with a purely legal analysis is that it ignores the realities of the position in question, and allows for inferences

based on "law" that arrive at "fact" that is not in evidence in the record.

The instant case also is in direct irreconcilable conflict with *Roldan-Plumey v. Cerezo-Suarez*, 115 F.3d 58 (1st Cir. 1997). In *Roldan-Plumey v. Cerezo-Suarez* a hearing examiner's position was found by the First Circuit to involve inherent duties of holding hearings, evaluating evidence, carrying out legal studies and issuing recommendations to a commissioner. This is absolutely no different than what David Mumford did for the Lorain County Court--he conducted hearings, evaluated evidence and made recommendations to the judges of the court. Yet the 6th Circuit found Mumford's position taking and analyzing evidence and making recommendations of findings of fact and conclusions of law to county judges to be a political position. As Justice Scalia has observed, how can party affiliation enter into such decisions, decisions that require impartiality?

The First Circuit's decision in *Roldan-Plumey v. Cerezo-Suarez* appropriately made a factual inquiry and looked only to the inherent duties of the position and found that they involved discrete technical and professional duties, and that the position was not a political position. The *Roldan-Plumey* court made specific findings that the "Examining Officer" held hearings, took oaths and declarations, evaluated evidence regarding conclusions of fact and law, carried out legal studies and issued recommendations to the Commissioner. These are the very duties performed by Mumford.

The instant case clearly made no such detailed, factual inquiry. Instead, it arrives at conclusions not supported by record evidence. For instance, it found that Mumford had access to confidential court documents and was in a personal confidential

relationship. Apdx. A, p. 22. There is absolutely nothing in the record to support this conclusion. In fact, all the evidence is to the contrary.[17]

Thus, the *Roldan-Plumey* decision of the 1st Circuit is in direct conflict with the instant case and with *Meeks*.

The *Branti v. Finkel* plurality held that "conditioning public employment on the provision of support for the favored political party 'unquestionably inhibits protected belief and association.'" *Rutan*, 110 S.Ct. at 2734, quoting *Branti* at U.S. 259, S.Ct. 2683.

This Court also has recognized that "a government has a significant interest in ensuring that it has effective and efficient employees." *Rutan* at 110 S.Ct. 2734, citing *Branti* at U.S. 259, S.Ct. 2683.

Petitioner respectfully submits that it is imperative that the *Branti* exception, whereby political affiliation may be used as an employment criteria only if it is an "appropriate requirement for the position involved," be clarified by this Court in order that the interests of the general public, government employers and government employees are no longer frustrated.

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[17] This type of analysis was specifically rejected by the Circuit Court in *Meeks v. Grimes*, 779 F.2d 417, 423 (7th Cir. 1985): "[w]e will not engage in the process of inferring a breach of duty from political opposition where the record does not even clearly support a finding that these bailiffs had routine access to sensitive documents."

#2 **Whether, under *McMillian v. Monroe County, Alabama*, 65 L.W. 4403 (1997), a county is liable for the administrative acts of an administrative judge for a county common pleas court acting in the particular area or issue regarding employment decisions for a local government?**

The decision in the instant case was rendered prior to this Court's recent decision involving a government official and the 11th Amendment. *McMillian v. Monroe County, Alabama*, 65 L.W. 4403 (June 2, 1997). In *McMillian* this Court held that the sheriff of an Alabama county, when acting in his law enforcement capacity, was a state official immune to suit for actions taken in that capacity pursuant to the Eleventh Amendment. What is instructional is not the result in *McMillian*, but, rather, the analysis. *McMillian* held that "[o]ur cases on liability of local governments under Section 1983 instruct us to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue." *Id.* at 4405, quoting *Jett v. Dallas Independent School District*, 491 U.S. at 738, 109 S.Ct. 2702 (1989) (court must identify 'those officials who have the power to make official policy *on a particular issue*.(emphasis added)."

Zeiba, as administrative judge, was a final policymaker when making personnel decisions for the entity, Lorain County. Zieba ran the domestic relations court. Lorain County Commissioner Jacoby testified that "all the elected officials in Lorain County, do their own hiring, set their own policies, make all their own decisions, with the exception of their budget. That's the only area of control we have over the departments."

Apdx. W, p.1. Commissioner Jacoby also testified that all the employees who work at the Domestic Relations Court are employees of Lorain County, including the judges and that Judges Basinski and Zieba and the court referees receive their paychecks from the Lorain County Auditor. Apdx. W., p.2. Therefore Judge Zieba was the administrator and final policy-maker for the County of Lorain when making employment decisions.[18]

The instant 6th Circuit decision never addresses or makes findings as to whether, in the performance of his duties as an administrator over Lorain County employees, Judge Zieba was a final policymaker for the county or state as to his administrative duties regarding Lorain County employees working for the court. This Court in *McMillian v. Monroe County, Alabama*, 65 LW 4403 (June 2, 1997) spells out that "...the question is not whether Alabama sheriffs act as county or state officials in all of their official actions, but whom they represent in a particular area or on a particular issue."

Rather than performing this analysis which is focussed on the nature of the particular actions in question, the Sixth Circuit's analysis is the sort of "...all or nothing..." analysis rejected by this Court in *McMillian*, 65 L.W. at 4404.

Instead, at Apdx. A, p.7, the court believed that "[t]he central inquiry confronting this appellate review is whether the

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[18] The instant case, at Apdx. A-12 attempts to imply that "state" money from some "special court fund" pays these county referees. This is not true, and Ohio Revised Code Section 2151.13 (Apdx. J-18) merely indicates that judges and employees of this court will be paid by the county treasurer. Nowhere in the record is there evidence that state money pays county referees.

Domestic Relations Court is a state of Ohio entity, or instead is an appendage of the Lorain County government, for section 1983 purposes." The court in the instant case concluded that because local courts are created by state law, because the State Supreme Court has supervisory authority over local courts, because state statutes outline the jurisdiction of local courts and because counties are required to provide funds for local courts, therefore they are components of state government. [Apdx. A, pp. 7-16] The Sixth Circuit implies, without stating, that these factors make the administrative judge a state official for all purposes and in all areas in which he makes any type of decision, even non-judicial administrative employment decisions. This analysis totally ignores the *McMillian* question to be asked: which governmental body did Judge Zieba represent on a particular issue or in a particular area? While acting in a judicial capacity, the judge may be representing the state, but the issue here is who he represents when making employment decisions regarding Lorain County employees. In this area, Zieba represented the County. This issue was ignored in the instant case.

Other circuits have anticipated *McMillian*, and thus are in conflict with the Sixth Circuit. The Fifth Circuit Court of Appeals in *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir., 1980) ruled that there were many actions of a county judge that justifiably could be considered to constitute or represent county "policy" and that in addition to judicial duties, a Texas county judge was charged with the performance of numerous executive, legislative and administrative chores in the day-to-day governance of the county and concluded that "...at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions

must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the county may be held responsible under section 1983." This analysis conflicts with the instant case.

Decisions from other circuits also conflict with the 6th Circuits approach: *Parker v. Williams*, 862 F.2d 1471, 1479 (11th Cir., 1989) [one official may exercise county authority over some matters and state authority over other matters]; *Davis v. Ector County, Tex.*, 40 F.3d 777, 784 (5th Cir., 1994) [although the district attorney's office (like Ector County itself) is a creation of the state, all of its functioning is county based]; *Harter v. Vernon*, 101 F. 3d 334, 342 (4th Cir., 1996), [Rockingham County Sheriff not a state official because the state treasury would not pay any judgement]; and *Lucas v. O'Loughlin*, 831 F.2d 232, 234-235 (11th Cir., 1987) [where sheriff's salary and deputies are paid out of county funds, where county commissioners budgeted the money for the sheriff's department, where the sheriff was elected under state law to serve the county as sheriff in the capacity of employer over his deputies, sheriff's actions were actions of the county[19]].

Though the judges of Lorain County Common Pleas Court can travel to other counties to hear cases, they cannot travel to other counties to fire county employees in other counties. Under the *McMillian* analysis, the Lorain County judges

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[19] The court in the instant case found that domestic relations judges are elected by county voters and that the county must fund the court with Lorain County funds. Apdx. A, pp. 12-13 and Apx. D, p. 3. No record based finding was reached in the instant case that a judgment in this case would be paid out of the state treasury.

cannot represent the state as to the particular area or issue regarding employment decisions for a Lorain County local government, since their power to hire and fire stops at the county line.

As the Court in *Eggar v. City of Livingston*, 40 F.3d 312, 315 (9th Cir., 1994) pointed out, "...officials can act on behalf of more than one government entity. *Owens v. Fulton County*, 877 F.2d 947, 952 (11th Cir., 1989)." Judge Zieba, in his administrative capacity in hiring and firing court employees, acted on behalf of the local political subdivision, Lorain County. In *Van Ooteghem v. Gray*, 774 F.2d 1332, 1337 (5th Cir., 1985) the Fifth Circuit appropriately pointed out that "[w]hatever state duties a County Treasurer may have, we are persuaded that in the personnel matters at issue here, Gray was wearing his county hat." Could Judge Zieba by assignment hear a case in Cuyahoga County rather than Lorain County? Of course. Could Lorain County Domestic Relations Court Judge Zieba fire Cuyahoga County Domestic Relations Court employees? Of course not. In fact, it is demonstrative that the Lorain County Prosecutor, rather than the Ohio Attorney General, represented this "county" defendant throughout the proceedings. The reverse would have been the case if defendant was clearly a "state" entity. It is logical, therefore, to assume that it would be the county that would be paying any damages should Mr. Mumford prevail.

Therefore, Judge Zieba was not acting in a state capacity, but rather, when wearing his administrative hat, was acting as a local County official, and therefore suable in his official capacity under 42 U.S.C. Section 1983, creating liability for Lorain County.

In light of this conflict between the analysis of the Sixth Circuit and that of other circuits, and in light of the fact that the Sixth Circuit did not have the benefit of this Court's *McMillian* decision, at the very least, this case should be remanded to the lower courts for reconsideration of this issue.

In addition, even if the administrative judge of the court was acting as a state official when making personnel decisions, the Eleventh Amendment would not mandate dismissal of the complaint since that Amendment does not prevent the injunctive prospective relief of reinstatement[20]. Petitioner Mumford still seeks reinstatement and backpay.

The instant case also misinterprets two of this Court's opinions, *Ex Parte Young*, 209 U.S. 123 (1908) and *Green v. Mansour*, 474 U.S. 64, 68, 88 L.Ed.2d 371, 106 S.Ct. 423, 426 (1985). Footnote 8 of the instant case (Apdx. A, pp. 15-16) theorizes that the invocation of *Young* for prospective relief only cannot be salvaged because Mr. Mumford has joined with this request a prayer for retrospective relief, obviously backpay. The instant opinion, in this regard, relies on *Green v. Mansour*, 474 U.S. 64, 68, 88 L.Ed.2d 371, 106 S.Ct. 423 (1985). Yet nowhere in *Green v. Mansour* did this Court make such a ruling. What this Court did was to state that "the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law...(and that)...[r]emedies designed to end a continuing violation of

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[20] Once the record has been developed to show that no judgement in this case would come from state funds, backpay would also be available. This issue is not part of the record and should be developed below.

federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Id.*, at 68. There is no language in *Green v. Mansour* that could lead to a conclusion that "joining" a request for prospective and retroactive relief defeats a valid claim for prospective relief. Therefore, the court in the instant case clearly erred in failing to remand this case for trial on the issue of reinstatement. As long as Mumford is not reinstated, the unconstitutional violation continues. Rein-statement is the only prospective remedy to cure that violation.

The instant decision must be remanded with instructions to follow this Court's analysis in *McMillian*, or reversed, in order to limit the application of the 11th Amendment to true actions of the state as to the particular issue or area involved. Anything less will allow local entities to escape their constitutional responsibilities by labelling officials who truly are acting on behalf of the local entity as state officials.

CONCLUSION

For the reasons set forth above, this Court's standards for granting certiorari, as set out in Sup. Ct. Rule 10.1 are well met in this case. The petition should be granted.

Respectfully submitted,

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